SUPREME COURT NO. 80588-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Public Benefit Corporation

Petitioners,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent.

RESPONDENT CITY OF WOODINVILLE'S ANSWER TO AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

Respondent City of Woodinville ("the City") respectfully submits this answer to the April 18, 2008 brief filed by *amicus curiae* American Civil Liberties Union of Washington Foundation ("ACLU"). The ACLU contends that the Court of Appeals erred by refusing to consider the Washington constitutional claims of appellant Northshore United Church of Christ (NUCC). The crux of the ACLU's argument is that the Supreme Court should abandon its traditional practice of requiring parties to address the six factors enumerated in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), as a prerequisite to entertaining a state constitutional claim.

If accepted by the Court, this novel theory—which was not raised by any of the named parties—would mark a radical departure from 20 years of well-established precedent. It would also have enormous consequences reaching far beyond the instant litigation. For the reasons explained below, the Court should reject the ACLU's argument and reaffirm the requirement of thorough *Gunwall* briefing in state constitutional cases.

II. ARGUMENT

A. The Court of Appeals Correctly Refused to Consider NUCC's State Constitutional Arguments.

The ACLU's *amicus* arguments arise from the Court of Appeals' refusal to consider NUCC's claim that the City violated article I, section 11 of the Washington Constitution by denying the Church's temporary use permit application. *City of Woodinville v. Northshore United Church of Christ (NUCC)*, 139 Wn. App. 639, 653-54, 162 P.3d 427 (2007). In reaching this determination, the Court of Appeals succinctly recited and applied the relevant jurisprudential rule:

> The Washington State Constitution protects "freedom of conscience in all matters of religious sentiment, belief and worship." In some contexts, this provision provides greater religious protection than the analogous provision in the federal constitution. However, parties must engage in an analysis under *State v. Gunwall* unless the difference between the state and federal constitutions has been clearly established in a particular context. Here, the difference between the two provisions has not been clearly established. Yet the Church does not provide a *Gunwall* analysis. Thus, we do not reach the Church's state constitutional claims.

Id. at 654 (internal citation omitted).

The Court of Appeals' decision in this regard simply followed a longstanding rule of appellate practice: "If the party has not engaged in a *Gunwall* analysis, th[e] court will consider his claim only under federal

constitutional law." *State v. Fire*, 145 Wn.2d 152, 163-64, 34 P.3d 1218 (2001).

It remains undisputed that NUCC failed to support its article I, section 11 argument with the requisite *Gunwall* analysis. The appellate court's refusal to entertain NUCC's state constitutional theories was not only justifiable under these circumstances, it was clearly *required.* Courts "will not consider a claim that the Washington Constitution guarantees more protection than the federal constitution unless the party making the claim adequately briefs and argues the *Gunwall* factors." *Id.* at 163; *State v. Mierz*, 127 Wn.2d 460, 473 n.10, 901 P.2d 286 (1995) ("failure to engage in a *Gunwall* analysis in a timely fashion precludes us from entertaining a state constitutional claim"). By omitting any meaningful *Gunwall* analysis in its appellate briefing, NUCC effectively waived its state constitutional claims. The Court of Appeals correctly disregarded these arguments.

B. The *Gunwall* Briefing Requirement Is Clearly Defined.

The ACLU does not contend that the Court of Appeals' conclusion was erroneous under existing precedent. Instead, *amicus* starkly asks this Court to discontinue the *Gunwall* briefing requirement altogether. *Amicus* Brief at 10. One of the ACLU's chief arguments in support of this novel

proposition is its allegation that the *Gunwall* requirement is unclear. *Amicus* Brief at 7-10. The ACLU contends that the context-dependent nature of the *Gunwall* mandate unfairly confuses litigants because "it remains hard to predict whether *Gunwall* briefing will be needed in a given case." *Amicus* Brief at 7-10.[1]

This argument is without merit. Despite the ACLU's attempted characterization of the *Gunwall* briefing requirement as unpredictable and confusing, this Court clearly construes the standard to be "well settled", *Madison v. State*, 161 Wn.2d 85, 93 at n.5, 163 P.3d 757 (2007), "well established", *State v. Motherwell*, 114 Wn.2d 353, 368, 788 P.2d 1066 (1990), and "repeatedly" acknowledged. *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 538, 936 P.2d 1123 (1997). While the Court has occasionally refined the *Gunwall* briefing requirement throughout its 20 year history, the core principle of this mandate remains unchanged: "Where. . . the parties fail to brief the *Gunwall* factors, th[e] court will not consider a claim that our state constitution affords greater protection." *In re Marriage of Suggs*, 152 Wn.2d 74, 80, 93 P.3d 161 (2004).

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[1] The Petitioner NUCC has made no claim that it was confused or uncertain as to whether or not a *Gunwall* analysis was required. A review of the NUCC briefing to the Court of Appeals shows the NUCC simply ignored the *Gunwall* briefing requirement.

The ACLU nevertheless argues that, because application of the *Gunwall* requirement hinges upon the specific context in which a state constitutional claim arises, litigants are unable to accurately predict whether such briefing is necessary in a given case.[2] *Amicus* Brief at 7-9. As this Court has recognized, "a determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context." *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (citation and punctuation omitted). The ACLU suggests that the judiciary's application of this standard has been inconsistent, effectively creating a procedural pitfall for unwary litigants with otherwise valid state constitutional claims. *Amicus* Brief at 8-9.

But this alleged obstacle is easily overcome. Parties can (and should) thoroughly research the relevant caselaw to determine the extent to which a particular provision of the state constitution has been interpreted as providing more protection than its federal counterpart in the specific context at issue. This basic task demands no greater effort or speculation than any other substantive aspect of appellate case

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[2] If NUCC actually believed, based upon prior decisions of this Court, that a *Gunwall* analysis was not required, the Church arguably would have indicated as much in

preparation.[3] And when legitimate uncertainty exists regarding this Court's previous opinions, the obvious solution is for parties to brief the *Gunwall* factors out of an abundance of caution. Such briefing is encouraged in any event, even where not technically required *per se*. *See, e.g., Madison*, 161 Wn.2d at 93 n.5.

The context-dependent nature of the *Gunwall* analysis is nearly as well-settled as the underlying briefing requirement itself. *See, e.g., State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 131 n.1, 101 P.3d 80 (2004); *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 352 n.5, 96 P.3d 979 (2004); *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 18 n.12, 84 P.3d 859 (2004); *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994), and, contrary to the ACLU's assertion, requires no additional clarification. Again, the ACLU's dissatisfaction with existing precedent is obviously not shared by

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its briefing to the Court of Appeals. But, as indicated in Footnote 1, *supra*, NUCC simply ignored the *Gunwall* requirement in its briefing altogether.

[3] Citing Professor Spitzer's law review article, the ACLU correctly notes the significant decrease in the number of state constitutional claims dismissed by the Supreme Court for lack of *Gunwall* briefing in recent years. *Amicus* Brief at 7 (citing Hugh D. Spitzer, "New Life for the 'Criteria Tests in State Constitutional Jurisprudence: *Gunwall* is Dead—Long Live *Gunwall*!", 37 Rutgers L.J. 1169, 1183 (2006). But, as Professor Spitzer explains, this statistical trend primarily "reflects vastly improved briefing" by appellate counsel—a phenomenon which in turn has resulted from the judiciary's increased emphasis on state constitutional knowledge among practitioners. (For example, the Washington Bar Exam now includes a state constitutional law question.) Spitzer, 37 Rutgers L.J. at 1183-84 & n.92. A competent Washington attorney

this Court, which has repeatedly characterized the context-specific approach—including claims for which a *Gunwall* analysis is no longer necessary—as "well-established". *See, e.g., State v. Chenowith*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007); *Surge*, 160 Wn.2d at 70-71.

C. The *Gunwall* Briefing Requirement Is Supported by Sound Policy Considerations.

1. The *Gunwall* requirement is correct.

The ACLU contends that the *Gunwall* briefing requirement conflicts with existing law and provides no meaningful benefit to the court's decisional process. *Amicus* focuses upon this Court's 1988 *State v. Wethered* decision as the critical post-*Gunwall* juncture at which the Court made a "wrong turn". *Amicus* Brief at 6. The *Wethered* Court declined to address a state constitutional claim that had been inadequately briefed by reference to the *Gunwall* factors:

> By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, [appellant] requests us to develop without benefit of argument or citation of authority the "adequate and independent state grounds" to support his assertions. We decline to do so consistent with our policy not to consider matters neither timely or sufficiently argued by the parties.

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practicing in the modern era would be fairly expected to understand the *Gunwall* briefing requirement.

State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988) (internal citation omitted). The ACLU criticizes *Wethered* as imposing a "rigid rule where the style in which a brief is written determines the success or failure of a state constitutional claim" *Amicus* Brief at 6, 10-11.

Contrary to the ACLU's assertion, however, the *Wethered* Court merely acknowledged a longstanding principle of appellate procedure—i.e., that insufficiently briefed arguments will not be considered by the court—and applied it in the context of state constitutional claims. *Wethered*, 110 Wn.2d at 472. *Wethered* also underscores the vital role counsel play in developing the well-reasoned body of state constitutional precedent envisioned by the *Gunwall* Court. As explained by former Justice Utter:

> Shortly after *Gunwall*, the question arose as to whether briefing directed at the *Gunwall* neutral criteria was mandatory before arguments based on the state constitution would be considered by the Washington Supreme Court. The court in *State v. Wethered* decided that counsel must brief the *Gunwall* factors before it would consider whether a state constitutional provision affords greater protection than its federal counterpart.
>
> *Assistance from counsel in interpreting* state *constitutional provisions is vitally important.* Wethered *directs counsel to bring the constitutional issues into as sharp a focus as they possibly can by requiring them to fashion a state constitutional argument that addresses textual language,*

> *constitutional and common law history, structural differences, and local concerns. Our decision in Wethered reaffirmed that the criteria are a necessary starting point for a discussion between bench and bar about the meaning of a state constitutional provision[.]*

Robert F. Utter and Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 7 (2002) (emphasis added) (internal citation omitted).

The continued validity and significance of these considerations persists to the present day. Requiring parties to thoroughly brief the *Gunwall* factors enhances judicial economy by focusing the constitutional arguments for the reviewing court's benefit. *Id.* It dovetails neatly with the general rule that appellate courts will not consider inadequately briefed arguments. *See, e.g., State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). And it appropriately places the burden of initiating the state constitutional analysis upon the litigants themselves, who (1) have the largest stake in the outcome of the court's ultimate decision, and (2) are most familiar with the factual underpinnings of the case and are thus best equipped to argue why heightened state constitutional protection should or should not apply in that specific context.

The Court's *Wethered* decision complements the analytical framework established by *Gunwall*:

> [W]e stress that this court *must* have the benefit of a state constitutional argument that is of assistance to the court to determine the meaning of the language used as it relates to the state constitutional claim and whether there are factors other than language that should determine the scope of our constitutional provisions.

Collier v. City of Tacoma, 121 Wn.2d 737, 748 n.5, 854 P.2d 1046 (1993) (citing Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153, 1160-63 (1992) (emphasis added). Mandatory compliance with the *Gunwall* briefing requirement represents the only practical means of obtaining this vital input from counsel. "Absent such a requirement, courts would be asked to develop without benefit of argument or citation of authority the 'adequate and independent state grounds' to support a litigant's assertions." *State v. Clark*, 68 Wn. App. 592, 601, 844 P.2d 1029 (1993) (citing *Michigan v. Long*, 463 U.S. 1032 (1983)). This principle remains as valid today as when *Wethered* was decided in 1988.

2. Rejecting a state constitutional claim for failure to provide a *Gunwall* analysis is consistent with other appellate standards.

The ACLU contends that "[r]ejecting a potentially meritorious claim because the brief does not follow a rigid formula is an extreme sanction that does not exist anywhere else in our law." *Amicus* Brief at 12. But this assertion ignores the numerous other appellate briefing requirements which, if not satisfied, will lead to equally severe consequences for litigants.

A legal argument—however meritorious—raised for the first time in a reply brief will not be considered by an appellate court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Unchallenged factual findings of the trial court—however erroneous—are treated as verities on appeal. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Arguments that are not raised by an assignment of error or that are unsupported by citation will not be entertained at the appellate level. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Courts will strike factual references in appellate briefs to material outside the trial court record. *State v. Lively*, 130 Wn.2d 1, 18-19 n.4, 921 P.2d 1035 (1996). And even with respect to potentially valid constitutional claims, this Court will not consider an argument which the claimant failed to raise below. *State v. Pulfrey*, 154 Wn.2d 517, 528-29, 111 P.3d 1162 (2005). The

purpose and effect of the *Gunwall* briefing requirement is hardly anomalous in this respect.

D. The Instant Case Is an Inappropriate Setting to Consider the ACLU's Argument.

The ACLU contends that it "takes no position on the merits of the underlying dispute" between the City, NUCC and SHARE/WHEEL. *Amicus* Brief at 1. Viewed against the factual and procedural backdrop of the instant litigation, however, the ACLU's *Gunwall* theory—if accepted by this Court—would further perpetuate a consistent theme of NUCC's own legal arguments: avoidance of responsibility.

At its core, this lawsuit concerns the extent to which a church may circumvent its legal obligations under the guise of religious exercise. NUCC has consistently argued throughout this dispute that its status as a religious organization should exempt it from mandatory compliance with local zoning and permitting requirements. The church has likewise attempted to avoid its unambiguous contractual obligations under the parties' 2004 Temporary Property Use Agreement by relying upon an untenable interpretation of that document. Both the Superior Court and a unanimous panel of the Court of Appeals correctly rejected these arguments. *NUCC*, 139 Wn. App. at 646-48, 653, 654-655.

Now, at the eleventh hour of this lengthy dispute, the ACLU contends that the Church should be excused from complying even with longstanding appellate briefing requirements. The Court should reject what is essentially an attempt to rescue NUCC from the consequences of its own legal errors.

This is not the appropriate case for the Court to consider—much less impose—an entirely new theory of state constitutional jurisprudence. The underlying dispute between the parties concerns three discrete legal issues: (1) whether NUCC violated the City's land use ordinances by hosting the Tent City 4 homeless encampment without a valid permit; (2) whether NUCC's compliance with those regulations was excused by constitutional religious freedom principles or by the federal Religious Land Use and Institutionalized Persons Act (RLUIPA); and (3) whether the Church breached its contractual obligations under the 2004 agreement by installing the Tent City 4 encampment on its Woodinville property. *NUCC*, 139 Wn. App. at 650-61. Each of these questions has been extensively briefed by the parties.

The ACLU's proffered theory, however, reaches far beyond the scope of these issues and interjects an entirely different proposition into the instant case. That this argument was raised (belatedly) by an *amicus*

curiae rather than by a named party further underscores the impropriety of accepting the ACLU's proposal. The Supreme Court should reject the ACLU's theory and reaffirm the longstanding requirement that state constitutional claimants provide a *Gunwall* analysis as a prerequisite to judicial consideration.[4]

E. Any Decision Eliminating the Traditional *Gunwall* Briefing Requirement Should Be Prospectively Applied.

For the reasons explained above, the Supreme Court should decline the ACLU's invitation to abandon the traditional *Gunwall* briefing requirement in state constitutional cases. But even assuming *arguendo* that the Court ultimately accepts the ACLU's argument, application of this new approach should be given prospective application only. Any new rule announced by the Court should not excuse NUCC's failure to comply with

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[4] The inappropriateness of using the instant case to revisit the entire *Gunwall* briefing requirement is further underscored by an additional consideration. As the City explained in its original answer to this Court, the Court of Appeals' substantive holding would likely have remained the same even if a *Gunwall* analysis had been performed. In this regard, the Supreme Court has previously rejected NUCC's chief premise in this litigation—i.e., that its religious status effectively exempts it from local zoning and permitting requirements. Even under the Washington Constitution, "a church has no constitutional right to be free from reasonable zoning regulations." *Open Door Baptist Church v. Clark County*, 120 Wn.2d 143, 164-70, 99 P.2d 33 (2000) (quoting *Messiah Baptist Church v. County of Jefferson, Colo.*, 859 F.2d 820, 826 (10th Cir. 1988)). Thus, even assuming *arguendo* that the Court of Appeals erred by requiring NUCC to provide a *Gunwall* analysis, this error was clearly harmless. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 820, 147 P.3d 1201 (2006) (declining to apply Washington Constitution where no constitutional violation would exist even if *Gunwall* analysis *had* been performed).

the *Gunwall* briefing requirement as it has existed throughout the duration of this case.

This Court considers three factors in determining whether to apply a new civil law rule prospectively or retroactively: (1) the extent to which the rule in question establishes a new principle of law, either by overruling clear past precedent or deciding an issue of first impression; (2) weighing the merits by analyzing the prior history, purpose and effect of the rule, and whether retroactive application would advance or retard its operation; and (3) the extent to which retroactive application would impose an inequity. *In re Detention of Audett*, 158 Wn.2d 712, 720-21, 147 P.3d 982 (2006) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 99 (1971)).

Each of these factors favors prospective application of any new rule discontinuing the *Gunwall* briefing requirement. First, the Court's adoption of this approach would require it to overrule 20 years of clear precedent which has been consistently reaffirmed to the present day. *See, e.g., Madison*, 161 Wn.2d at 93 n.5, 163 P.3d 757 (2007); *Wethered*, 110 Wn.2d at 472. Second, the scant "prior history" of the new approach would be limited to the ACLU's *amicus* brief proposing the change, the purpose and effect of which have already been implicitly rejected by this Court in prior cases reaffirming the need for a *Gunwall* analysis. *See, e.g.,*

Wethered, 110 Wn.2d at 472. Finally, imposing any new rule to this effect would inequitably prejudice the City, which has itself thus far had no opportunity—or need—to substantively brief the *Gunwall* factors as applied to the specific context of this dispute. *Cf. State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994). Retroactive application of any new rule eliminating the *Gunwall* briefing requirement is unwarranted under these circumstances.

III. CONCLUSION

The Court of Appeals correctly refused to consider NUCC's state constitutional claims due to the Church's failure to provide a *Gunwall* analysis. In challenging this decision, the ACLU's *amicus curiae* argument asks this Court to overturn two decades of settled precedent. For the reasons explained above, the Court should reject this argument, reaffirm the longstanding requirement of *Gunwall* briefing in state constitutional cases, and uphold the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 12th day of May, 2008.

Respectfully submitted,

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